

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 97-0603 CSET
CONTROLLED SUBSTANCE EXCISE TAX
FOR TAX PERIODS: 1997

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

Issue

Controlled Substance Excise Tax-Imposition

Authority: IC 6-7-3-5, IC 6-8.1-5-1 (b), Hurst v. Department of Revenue, 720 N.E. 2d 370 (Ind. Tax.1999).

Taxpayer protests the assessment of Controlled Substance Excise Tax.

Statement of Facts

Taxpayer was arrested for possession of marijuana. The Indiana Department of Revenue issued a record of Jeopardy Finding, Jeopardy Assessment Notice and Demand on October 23, 1997 in a base tax amount of \$5,768.70. Taxpayer filed a protest to the assessment. A hearing was held by telephone. Further facts will be provided as necessary.

Controlled Substance Excise Tax-Imposition

Discussion

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of marijuana in the State of Indiana. Taxpayer has the burden of proving that the assessment is incorrect. IC 6-8.1-5-1(b).

Officers in an Indiana State Police helicopter sighted marijuana growing near a barn on a routine flyover. Ground units were directed to the farm and officers knocked at the door. Taxpayer answered the door. Also at the home was another person who owned the property. The other person gave the officers permission to search the house, outbuildings and the farm. The officers found five marijuana plants growing about 20 feet from the east side of the barn.

Possession of the marijuana can be either actual or constructive. Hurst v. Department of Revenue, 720 N.E. 2d 370 (Ind. Tax. 1999). Although both direct and circumstantial evidence may prove constructive possession, proof of presence in the vicinity of drugs, presence on property where drugs are located, or mere association with the possessor is not sufficient. *Id.*, 374-375. To prove constructive possession there must be a showing that Taxpayer had not only the requisite intent but also the capability to maintain dominion and control over the substance. *Id.*, 374.

In this case, Taxpayer did not own the property. There was marijuana residue found under the bed in which he was sleeping. Other people, however, also slept in that room. He also admitted that he sometimes mowed the lawn. This evidence, however, is not enough to determine that he had constructive possession of the marijuana growing on the farm as defined by the Court.

Finding

Taxpayer's protest is sustained.